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CHARLES ELMORE CRO
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No. 841

# Supreme Court of the United States

October Term, 1949.

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WILLIAM HENRY JACKSON, - - Petitioner,

vs.

UNITED STATES OF AMERICA, - - Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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(2) The United States Court of Appeals, in holding that there was no error in the court charging the jury on a crime for which the petitioner was not indicted, decided a Federal question in a way in conflict with applicable decisions of this court and of another United States Court of Appeals, and the United States Court of Appeals in holding that it was not error for the court to charge that if the petitioner had stolen property in his possession that it was presumed that he transported it in interstate commerce decided a Federal question in a way in conflict with an applicable decision of this court .... 15

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# Supreme Court of the United States

**October Term, 1949.**

**No.———.**

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WILLIAM HENRY JACKSON, - - - *Petitioner,*

*v.*

UNITED STATES OF AMERICA, - - *Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

### JURISDICTION.

1. The judgment of the United States Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered February 8, 1950 (R. 99), and a petition for rehearing was denied April 18, 1950 (R. 129).

2. The statutory provision which is relied upon to sustain the jurisdiction of this Court is Section 1254 of the new Federal Judicial Code (28 U. S. C., Section 1254).

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

William Henry Jackson was indicted, tried and convicted in the United States District Court for the Southern District of Ohio, Western Division. The indictment (R. 1-2) charges that the petitioner "did have in his possession and did dispose of in Cincinnati, Southern District of Ohio, Western Division, certain pieces of jewelry which *had been transported in interstate commerce* from Pompano Beach, Florida, to Cincinnati, Ohio," knowing the same to have been stolen. The indictment purports to be brought under the National Stolen Property Act (then 18 U. S. C., Section 416, now 18 U. S. C., Section 2315), which imposes punishment on persons who dispose of merchandise "moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen." There is entirely omitted from the indictment any charge to the effect that the jewelry at the time it is charged to have been disposed of was moving as, or was a part of, or constituted interstate or foreign commerce. The sufficiency of the indictment was attacked in the District Court in the amended or supplemental motion for a new trial (R. 89) and in the motion for arrest of judgment (R. 91). These motions were overruled by the District Court (R. 92-93).

The indictment did not charge the petitioner with *transporting* stolen goods in interstate commerce in violation of 18 U. S. C., Section 415 (now Section 2314) and there was no evidence that the petitioner transported stolen goods in interstate commerce. Notwithstanding this, the District Court charged the jury as if the petitioner were indicted under this section, and further charged the jury as a matter of law that if they found that petitioner had in his possession in one State property which had been stolen shortly theretofore in another State that it was presumed that the petitioner transported the stolen property in interstate commerce. The Court instructed the jury (R. 80):

> "You, members of the jury, are the sole judges of the facts, but you must take the *law* from the Court. The *law,* as the Court gives it to you, is binding upon you. It is not for you to determine what you think the *law* should be."

The Court further instructed the jury (R. 81); and although the instruction refers to Section 416, the Court actually read Section 415, which relates to transportation and which was not charged in the indictment and concerning which no proof was introduced:

> "It is the *law,* section 416, The United States Code, Annotated, 'Whoever shall transport, or cause to be transported, in interstate or foreign commerce, any goods, wares or merchandise, security or money to the value of $5,000 or more, theretofore stolen or taken feloniously by fraud, or with intent to steal or purloin, knowing the same to have been stolen or so taken, shall be guilty.' "

The Court further instructed the jury (R. 83):

> "Now, it is also the *law* that the possession of stolen property in another State than that in which it was stolen shortly after the theft, raises the presumption that the possessor transported the stolen property in interstate commerce, but such presumption is subject to explanation."

The United States Court of Appeals for the Sixth Circuit held that the indictment, although ineptly drawn, is not invalid (R. 103), and that the reference in the instructions to the *transportation* of stolen goods in interstate commerce did not constitute the submission of that question to the jury (R. 130).

## QUESTIONS PRESENTED.

1. Was the United States Court of Appeals in error in holding the indictment valid when it merely charged that the goods *"had been transported in interstate commerce"* and entirely omitted any charge to the effect that the jewelry at the time it is charged to have been disposed of was moving as, or was a part of, or constituted interstate or foreign commerce?

2. Was the United States Court of Appeals in error in approving the District Court's charging the jury on a crime for which the petitioner was not indicted and on which no proof was introduced and further charging that if the petitioner had stolen property in his possession that it was presumed that he transported it in interstate commerce?

**REASONS RELIED ON FOR ALLOWANCE OF WRIT.**

1. The United States Court of Appeals, in holding that it is sufficient in an indictment under the National Stolen Property Act to charge that the goods *"had been transported in interstate commerce,"* rendered a decision in conflict with the decisions of other United States Courts of Appeal on the same matter (*Davidson* v. *United States,* 61 F. 2d 250 (C.A. 8); *Grimsley* v. *United States,* 50 F. 2d 509 (C.A. 5); and *United States* v. *McGuire,* 64 F. 2d 485 (C.A. 2)).

2. The United States Court of Appeals, in holding that there was no error in the court charging the jury on a crime for which the petitioner was not indicted, decided a Federal question in a way in conflict with applicable decisions of this Court (*Beaver* v. *Taylor,* 1 Wall, 637; *Terminiello* v. *Chicago,* 337 U. S. 1; and *Stromberg* v. *California,* 283 U. S. 359), and in conflict with the decision of another United States Court of Appeals (*Walker* v. *United States,* 104 F. 2d 465 (C.A. 4)), and the United States Court of Appeals, in holding that it was not error for the Court to charge that if the petitioner had stolen property in his possession that it was presumed that he transported it in interstate commerce, decided a Federal question in a way in conflict with an applicable decision of this Court (*Bollenbach* v. *United States,* 326 U. S. 607).

## PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings by the said Court had in this cause, numbered and entitled on its docket, No. 10,924, William Henry Jackson v. United States of America, to the end that this cause may be reviewed and determined by this Court, and for such other and further relief as to this Court may seem proper.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### OPINIONS OF COURT BELOW.

The original opinion of the United States Court of Appeals for the Sixth Circuit was rendered on February 8, 1950 (R. 100), and has not been officially reported, and the opinion of that Court on the petition for rehearing was rendered on April 18, 1950 (R. 129), and has not been officially reported.

### JURISDICTION.

The jurisdictional statement in the petition for writ of certiorari is adopted.

### STATEMENT OF THE CASE.

The Summary Statement of the Matter Involved in the petition for writ of certiorari is hereby adopted.

### SPECIFICATION OF ERRORS.

(1) The United States Court of Appeals was in error in holding the indictment valid when it merely charged that the goods *"had been transported in interstate commerce"* and entirely omitted any charge to the effect that the jewelry at the time it is charged to have been disposed of was moving as, or was a part of, or constituted interstate or foreign commerce.

(2) The United States Court of Appeals was in error in approving the District Court's charging the

jury on a crime for which the petitioner was not indicted, and on which no proof was introduced, and further charging that if the petitioner had stolen property in his possession that it was presumed that he transported it in interstate commerce.

## ARGUMENT.

1. **The United States Court of Appeals, in Holding That It Is Sufficient in An Indictment Under the National Stolen Property Act Merely to Charge That the Goods "Had Been Transported in Interstate Commerce" and Entirely Omit Any Charge to the Effect That the Jewelry At the Time It Is Charged to Have Been Disposed of Was Moving As or Was a Part of or Constituted Interstate or Foreign Commerce, Rendered a Decision in Conflict With the Decisions of Other United States Courts of Appeal on the Same Matter.**

The indictment (R. 1-2) charges that the petitioner did dispose of in Cincinnati, Ohio, "certain pieces of jewelry which *had been transported in interstate commerce* from Pompano Beach, Florida, to Cincinnati, Ohio," knowing the same to have been stolen. There is entirely omitted from the indictment any charge to the effect that the jewelry at the time it is charged to have been disposed of was moving as or was a part of, or constituted interstate or foreign commerce. The Court of Appeals for the Sixth Circuit, in concluding "that the indictment, although ineptly drawn, is not invalid" (R. 103), rendered a decision in conflict with the decision of the Court of Appeals of the Eighth Circuit in *Davidson* v. *United States,* 61 F. 2d 250. The

opinion of the Sixth Circuit attempts to distinguish the *Davidson* case on the ground that it turned principally upon lack of evidence to prove conspiracy to violate the statute, but it is submitted that the following quotations from the *Davidson* opinion show that the Eighth Circuit thoroughly considered the sufficiency of the indictment and held it to be fatally defective:

> "It is, of course, an indispensable ingredient of the offense that the car at the time it was received, concealed, stored, bartered, sold or disposed of, was 'moving as, or was a part of, or constituted interstate commerce.' If the car had lost the character of interstate commerce at the time it was received, etc. no offense against the laws of the United States has been proven. There is no testimony in the record that the transporters of this car intended to deliver to these defendants Brummell and Davidson. The mere fact that the car had theretofore been transported in interstate commerce is not sufficient. The act does not purport to exercise jurisdiction over individuals who receive or sell stolen cars after such cars cease to move in or be a part of interstate commerce. Congress would have no constitutional authority to pass this act except for the commerce clause of the Constitution.
>
> * * * * * * *
>
> "Furthermore, it will be observed that these two defendants in this third count are charged with wilfully, unlawfully, knowingly, and feloniously receiving, concealing, and storing one Buick sedan motor-car 'which had theretofore been stolen at Hominy, Oklahoma, on the 23rd day of March

1931, and transported in interstate commerce from Tulsa, Oklahoma, to Kansas City, Jackson County, Missouri,' and that the defendants named 'well knowing that the said Buick Sedan, Motor No. 2,649,000, as aforesaid, had been theretofore stolen.' There is entirely omitted from the indictment any charge to the effect that the vehicle at the time it is charged to have been received, concealed, and stored, was moving as or was a part of, or that it constituted interstate or foreign commerce. It is no offense against any federal statute to receive or conceal, or to store a car that has been stolen, nor was it material that at some time the property had been transported in interstate commerce. It is essential to the offense that the property, at the time it is charged that the defendants received or stored it, was moving as, or was a part of, interstate commerce. The third count does not charge any offense against the laws of the United States. The government might prove every element of the crime charged in the third count, and nevertheless no crime against the laws of the United States would have been committed. If the evidence must show that the car was moving in or was a part of or constituted interstate commerce, it follows as a necessary conclusion that the indictment must also charge such facts.

* * * * * * *

"It cannot be said that the defect is one of form and not of substance. Manifestly, if this car was not in interstate commerce when received, the federal court has no jurisdiction, and the very language employed in the indictment negatives any inference that the car was a part of interstate commerce at the time it was received and stored."

The opinion of the Sixth Circuit is also in conflict with the decision of the Fifth Circuit in *Grimsley* v. *United States,* 50 F. 2d 509. The opinion of the Sixth Circuit attempts to distinguish the *Grimsley* case on the grounds that the indictment there involved contained no allegation whatever with respect to the stolen car being a part of interstate commerce. The first grammatical paragraph of the opinion in the *Grimsley* case quotes the following as being in the indictment:

> "'* * * then and there unlawfully and feloniously, did sell a certain motor vehicle, to-wit, Ford Sedan, Motor No. A-669267, then and there well knowing the same to have been transported in interstate commerce, that is to say from Mobile, in the State of Alabama, to Pensacola in the State of Florida, and then and there well knowing the same to have theretofore been stolen.'"

A charge that Grimsley sold a motor vehicle "well knowing the same to have been transported in interstate commerce" certainly seems to be equivalent to charging that the vehicle had been transported in interstate commerce, because if it had not been so transported he could not have been charged with knowing that it had been transported in interstate commerce. The Fifth Circuit did not treat the indictment as having failed to allege that the vehicle had been in interstate commerce, but its opinion assumes that there had been such transportation and holds that the indictment was fatally defective on the ground that there was no charge which would indicate other than such transportation had come to an end and the automobile had come to rest and lost its interstate character.

The *Davidson* and *Grimsley* cases arose under indictments under the National Motor Vehicle Act (then 18 U. S. C., Section 408), but there is no substantial difference between that Act and the National Stolen Property Act here involved.

The decision of the Sixth Circuit is also in conflict with the decision of the Second Circuit in *United States* v. *McGuire,* 64 F. 2d 485, cert. den. 290 U. S. 645, which arose under 18 *U. S. C.,* Section 387, and in which the indictment charged the defendants with causing one Finn to receive lottery tickets which had theretofore been transported in interstate commerce and where the Second Circuit held the indictment defective, saying:

> "* * * If the words of the indictment are given their usual meaning, the interstate carriage of the tickets had ended before the defendants caused Finn to receive them, and it might have ended an indefinite time before. This statute must be strictly construed. France v. United States, 164 U. S. 676, 17 S. Ct. 219, 41 L. Ed. 595. It is the authority of Congress to regulate interstate commerce which makes such a statute valid. Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492. After the tickets, though they had been sent from Pennsylvania to New York, were received from the interstate carriage in New York, they were no longer in interstate commerce. Sonneborn Bros. v. Cureton, 262 U. S. 507, 43 S. Ct. 643, 67 L. Ed. 1095. And the allegations that they had theretofore been so sent when the defendants caused Finn to receive them means that interstate

transportation of them was, as of that time, a thing of the past. It had ended. * * *

* * * * * * *

"But no crime was alleged, since it was not only consistent with the averment, but it was the ordinary import of the language used, that the interstate shipment had ended before Finn received the tickets. An essential fact, *viz.*, that the defendants caused Finn to receive the tickets in interstate commerce, was lacking. To withstand the demurrer, the indictment had to allege all the facts necessary to be proved to constitute the offense. United States v. Simmons, 96 U. S. 361, 24 L. Ed. 819; Evans v. United States, 153 U. S. 584, 14 S. Ct. 934, 38 L. Ed. 830. And as this was a matter of substance and not of form, the verdict did not cure the defect, United States v. Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, and defendant McGuire could raise the point as he did by his motion in arrest of judgment, United States v. Simmons, *supra*. The first count must be held bad as to all defendants."

Rule 12 (b)(2) of the Federal Rules of Criminal Procedure provides, "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Rule 34 of the Federal Rules of Criminal Procedure provides, "The court shall arrest judgment if the indictment or information does not charge an offense, or if the court was without jurisdiction of the offense charged." Rule 52 (b) of the Federal Rules of Criminal Proced-

ure provides, "Plain errors or defects affecting sub
stantial rights may be noticed although they were no
brought to the attention of the court." The objectio
to the failure of the indictment to charge an offens
was raised in the amended or supplemental motion fo
new trial (R. 89) and in the motion for arrest of judg
ment (R. 91). The Eighth Circuit in the *Davidso*
case, *supra,* and the Second Circuit in the *McGuir*
case, *supra,* specifically held, as shown by the fore
going quotations from the opinions, that a defect suc
as in this indictment is one of substance and not o
form. Here there is involved not only the substantia
rights of the petitioner, but of Congress and the Fed
eral courts. Any power of Congress to legislate an
the Federal courts to try must be found in the Com
merce Clause of the Constitution (Article I, Section 8
Clause 3). It has been settled since *Schechter* v
*United States,* 295 U. S. 495, that where the flow i
interstate commerce has ceased the power of Congres
to regulate also ceases, and the jurisdiction of the Fed
eral courts necessarily ceases. A defect arising fro
Constitutional limitations, the power of Congress t
legislate and the jurisdiction of Federal courts canno
be said to be a mere technical defect. The Sixth Ci
cuit, by quoting from *McNally* v. *Hill,* 69 F. 2d 3
(C.A. 3), indicates that that court may believe tha
it would be desirable for the Federal Government t
retain jurisdiction as long as possible on articles whic
have moved in interstate commerce. A like argumen
was advanced in the *Schechter* case on the ground tha
the then National crisis demanded the regulation

there sought to be enforced, but this contention was denied although there it was a matter that only could be dealt with by Federal legislation, whereas here State statutes can be enforced effectively against dealing in stolen property.

**2. The United States Court of Appeals, in Holding That There Was No Error in the Court Charging the Jury on a Crime for Which the Petitioner Was Not Indicted, Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court and of Another United States Court of Appeals, and the United States Court of Appeals in Holding That It Was Not Error for the Court to Charge That if the Petitioner Had Stolen Property in His Possession That It Was Presumed That He Transported It in Interstate Commerce Decided a Federal Question in a Way in Conflict With An Applicable Decision of This Court.**

There can be no claim that the indictment charges the petitioner with transporting stolen goods in interstate commerce. As it was admitted that the petitioner had in his possession in Ohio property which theretofore had been stolen in Florida, the court in effect instructed the jury that the petitioner was presumed to be guilty of a crime which was not alleged in the indictment. After instructing the jury that it must take the *law* as the court gives it (R. 80), the court read to the jury the then Section 415 of 18 U. S. C., which relates to transportation (although the court referred to it as Section 416), with the statement "It is the *law*" (R. 81), and then the court proceeded further to instruct the jury that "It is also the *law*" that

the possession of stolen property in a State other than that in which it was stolen shortly after the theft raises the presumption that the possessor transported the stolen property in interstate commerce (R. 83).

The Sixth Circuit in its opinion on the petition for rehearing held that while the district court "*inadvertently*" read the section of the Code relating to transportation of stolen goods in interstate commerce, the only question submitted to the jury was a question covered by the indictment (R. 130). The record is comparatively short and a reading of it will demonstrate that the petitioner was tried for every act or omission of his lifetime. The record establishes that he had used aliases, that many years ago he had been convicted of other offenses, and that he had been in the bookmaking business. With this background in the record, it was certainly prejudicial for the court further to instruct the jury that the petitioner was presumed to be guilty of the offense of transporting stolen goods in interstate commerce when such offense was not alleged in the indictment, even though the court also may have instructed the jury on the offense that is alleged in the indictment.

The holding of the Sixth Circuit to the effect that it was not error to charge the jury on an offense not covered by the indictment is directly in conflict with the decision of the Fourth Circuit in *Walker* v. *United States,* 104 F. 2d 465, 469, where the Fourth Circuit held that such error was so prejudicial in character as to require a reversal, although no objection was made to the charge at the time of its delivery.

The decision of the Sixth Circuit is also in conflict with the decision of this court in *Beaver* v. *Taylor,* 1 Wall. 637, 644, where this court held:

> "The law, as to instructions outside of the facts of the case, or involving abstract propositions, is well settled. If they may have misled the jury to the injury of the party against whom the verdict is given, the error is fatal."

As was said by this court in *Starr* v. *United States,* 153 U. S. 614, 626:

> "The influence of the trial judge on the jury is necessarily and properly of great weight and that his lightest word or intimation is received with deference and may prove controlling."

In *Williams* v. *United States,* 131 F. 2d 21, 23, (C. A., D. C.) Mr. Justice Vinson, then Associate Justice of the United States Court of Appeals for the District of Columbia, said:

> "It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safe-guard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of responsible citizens, is entitled to this legal instruction if it must accept the duty

> of passing upon the very life and death of a man. The law requires it."

The decision of the Sixth Circuit in approving the charge that if the petitioner had stolen property in his possession that it was presumed that he transported it in interstate commerce is directly in conflict with the decision of this court in *Bollenbach* v. *United States,* 326 U. S. 607, where the district court charged the jury:

> "I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case."

With respect to this instruction this court said:

> "The Government does not defend the 'presumption' as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found insupportable in Tot v. United States, 319 U. S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241, even though that was embodied in an Act of Congress."

It is true that the petitioner did not except to the charge when given, but such an exception was held unnecessary by the Fourth Circuit in the *Walker* case, *supra.* Here the court submitted two matters to the jury—one which was charged in the indictment, and one which was not charged in the indictment. As the

verdict of the jury was general, it is impossible to determine which matter the jury had in mind when it found the petitioner guilty. This situation is identical with an indictment under a statute where one part of the statute is unconstitutional and because of a general verdict it is impossible for the appellate court to determine whether or not the jury convicted under the unconstitutional portion of the statute. In cases such as these this court, in *Terminiello* v. *Chicago,* 337 U. S. 1, reversed a conviction, although no exception was taken to the charge, and this court, in *Stromberg* v. *California,* 283 U. S. 359, reversed a conviction on an erroneous instruction where not only was no exception taken, but counsel for the defendant in the lower court had accepted the instruction as being correct.

Respectfully submitted,

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